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No. ____.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS POWER & LIGHT COMPANY,

Petitioner,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March 4, 1987

QUESTION PRESENTED

Whether a Federal Energy Regulatory Commission order under the general provisions of Section 206 of the Federal Power Act forcing an operating electric utility in a holding company system to pay for a portion of the costs of a new generating plant constructed by an affiliated company violates the specific limitations on the Federal Energy Regulatory Commission's jurisdiction in Section 201(b) of the Act?

STATEMENT REQUIRED BY RULE 28.1

Petitioner Arkansas Power & Light Company is a wholly-owned subsidiary of Middle South Utilities, Inc. Middle South Utilities, Inc. has no parent company. Other subsidiaries of Middle South Utilities, Inc. are Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., Middle South Services, Inc. (now known as MSU System Services, Inc.), Middle South Energy, Inc. (now known as System Energy Resources, Inc.), Electric, Inc. Affiliates of Arkansas Power & Light Company are System Fuels, Inc. and Arklahoma Corp.

PARTIES BELOW

Arkansas Power & Light Company was a Petitioner in the Court of Appeals. It was also an intervenor in several of the dockets consolidated by the Court of Appeals.

The Respondent in the Court of Appeals was the Federal Energy Regulatory Commission, which was supported by Petitioner-Intervenor Louisiana Public Service Commission; Jefferson Parish, Louisiana; City of New Orleans, Louisiana; Occidental Chemical Corporation; Georgia Gulf Corporation; and by Intervenors Union Carbide Corporation; Louisiana Power & Light Company; New Orleans Public Service Inc.; Middle South Energy, Inc.; and Middle South Services, Inc.

Other Petitioners-Intervenors in the Court of Appeals were Mississippi Public Service Commission; Mississippi Power & Light Company; Representative Webb Franklin; Edwin Lloyd Pittman, Attorney General of the State of Mississippi; Mississippi Legal Services Coalition; Arkansas and Missouri Congressional Delegations; Arkansas Public Service Commission; State of Arkansas; Reynolds Metals Company; Cities of Conway and West Memphis, Arkansas; AMAX, Inc.; Missouri Public Service Commission; Arkansas Industries; Representative Wayne Dowdy; Mississippi Industries (comprised of Anderson-Tully Co.; Columbus Lumber Co.; Crouse-Hinds Lighting; Great Southern Wirebound Box Co.; Madison Furniture Industries; Chloride, Inc., Automotive Div.; Greenville Mill; Marathon LeTourneau Co.; Perma "R" Products, Inc.; and Cives Steel Co.); Weyerhaeuser Co.; Riceland Foods; Associated Industries of Arkansas.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Arkansas Power & Light Company ("AP&L") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 6, 1987.[1]

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix (Appendix A).[2] The opinion of the respondent Federal Energy Regulatory Commission ("FERC"

1 On February 20, 1987, the Arkansas Public Service Commission, *et al.* filed with the Court No. 86-1380, a petition for a writ of certiorari to review the decision of the District of Columbia Circuit.

2 AP&L will rely on the Appendix accompanying the petition in No. 86-1380, and references herein are to that Appendix.

or the "Commission") (Appendix C) and the Commission's opinion on rehearing (Appendix B) also appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 6, 1987 in *Mississippi Industries v. FERC*, No. 85-1611 (D.C. Cir. January 6, 1987). This petition for certiorari was filed within 90 days of that date. As of the date hereof, several parties had filed petitions for rehearing (with suggestions for rehearing *en banc*) with the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1977).

STATUTORY PROVISIONS INVOLVED

Sections 201(b)(1) (16 U.S.C. § 824(b)(1) (1983)) and 206 (16 U.S.C. § 824e (1983)) of the Federal Power Act ("FPA") are set forth in Appendix F at 527a-28a and 541a, respectively, to which the Court's attention is respectfully invited.

STATEMENT OF THE CASE

This case presents the question of the kinds of remedies that the Commission may impose in reviewing inter-affiliate power arrangements under §§ 205 and 206 of the FPA (16 U.S.C. §§ 824d and 824e (1983)). AP&L is a wholly-owned subsidiary of Middle South Utilities, Inc. ("MSU"), a public utility holding company registered under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.* (1983). MSU is an "integrated public utility system." *Middle South Utilities, Inc.*, 35 S.E.C. 1, 10 (1953).

AP&L bargained with other MSU operating company subsidiaries for a reasonable disposition of the power to be

produced by the Grand Gulf nuclear generating station.[3] After many months of negotiations, it was agreed that the costs and power from Grand Gulf would be shared by the three other operating utility subsidiaries of MSU—Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service Inc. ("NOPSI"), and that AP&L would not share in any such costs or purchase such power.

This agreement was embodied in a Unit Power Sales Agreement ("UPSA"), executed by the above subsidiaries and MSE, which was filed with the FERC as a jurisdictional rate schedule under § 205 of the FPA. A related filing, made at about the same time, involved the "System Agreement" among all the MSU operating company subsidiaries for the supply of power. Together, the UPSA and the System Agreement define the cost effect of Grand Gulf on each of the operating companies.

Upon review of the two agreements, the FERC held that the UPSA was unduly discriminatory under §§ 205 and 206 of the FPA and directed a reformation of the UPSA under § 206 of the FPA, forcing AP&L to become a "Purchaser" and requiring AP&L to purchase a 36% "Entitlement Percentage," equating to 405 megawatts, the largest of any of the MSU operating companies. Appendix C, 216a. Despite the ordered reformation of the UPSA, FERC contended that it was "allocating costs" among the operating company subsidiaries of MSU. FERC approved the System Agreement without change relevant here. FERC did not evaluate, however, any means of

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3 Grand Gulf is a two-unit nuclear operating plant located in Port Gibson, Mississippi. The references herein to Grand Gulf are to Grand Gulf Unit I, which began commercial operation on July 1, 1985. Grand Gulf Unit II is in construction, but currently construction is indefinitely suspended. Ninety percent (1125 megawatts) of Grand Gulf is owned by Middle South Energy, Inc. ("MSE"), now known as System Energy Resources, Inc., also a wholly-owned subsidiary of MSU. The remaining ten percent is owned by South Mississippi Electric Power Association. The FERC orders allocated MSE's 90% share of Grand Gulf Unit I, and the various percentages herein are with reference to that 90% share.

remedying the "undue discrimination" it found other than imposing increased costs on AP&L.

AP&L objects to the remedy in FERC's order as being beyond FERC's statutory authority because FERC's order forces AP&L to assume the responsibilities of a purchaser for a significant portion of the power from the Grand Gulf generating facility. AP&L sought rehearing before FERC (Appendix B) and, following denial by the agency, petitioned for review in the Court of Appeals pursuant to § 313 of the FPA (16 U.S.C. § 825*l* (1983)).

The decision below affirmed FERC's orders, for substantially the reasons presented by the FERC. Relying heavily on the integrated nature of the planning and operations of MSU operating companies, the Court below held: "In the factual context of the instant case, the reallocation of capacity costs among the parties cannot be described as a compelled purchase of either power or additional generating facilities." Appendix A, 47a.

REASONS FOR GRANTING THE WRIT

This case presents a significant issue of the extent of Commission authority under § 206 of the FPA. The Court below interpreted the § 206 reformation authority to be unfettered by the § 201(b)(1) exclusion from Commission jurisdiction of the regulation of generating facilities. This interpretation means that FERC would have authority under the FPA to compel any electric utility subsidiary of a holding company to assume the responsibility for the costs of, and entitlement to the power from, any generating facility of any affiliated company. Unless corrected by this Court, the Court of Appeals' decision reads the express statutory exclusion in § 201(b)(1) out of the FPA.

1. The Decision Below Creates A Conflict In Principle With This Court's Decisions Defining The Extent Of FERC Authority.

Decisions of this Court have defined the extent of FERC authority under § 206 of the FPA. The Commission has authority to reform certain utility contracts where necessary in the public interest. *United Gas Pipe Line Co. v. Mobil Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Although the interrelationship between the § 206 reformation authority and the § 201(b)(1) exemption of generation facilities from Commission authority has not been expressly decided, the principle established in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), leads to the conclusion that FERC may not reform a contract in the fashion ordered here.[4] In *Connecticut Light & Power Co.*, this Court held that a prohibition against regulation of local distribution facilities in § 201(b) was a "limitation on jurisdiction and a legal standard that must be given effect. . . ." 324 U.S. at 531.

In addition to the exemption for local distribution facilities, § 201(b)(1) of the FPA exempts from Commission jurisdiction the regulation of generating facilities, except where such regulation is specifically provided for in another provision of the FPA. FERC's orders here were founded on the general grants of §§ 205 and 206 of the FPA. Neither the Court of Appeals nor the FERC points to a specific authorization in the FPA for the FERC order regulating the Grand Gulf facility by directing that AP&L assume the burdens of Purchaser of a 36% Entitlement Percentage in the reformed UPSA.

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4 As held in *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964): "§ 201(b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce *not expressly exempted by the Act itself* . . . (emphasis added). The Court's related footnote discussed the local distribution facilities exemption addressed by the Court in *Connecticut. Southern Calif. Edison*, 376 U.S. at 210 n.6.

The Court below characterized the FERC orders as legitimate "cost reallocations," justified by the integrated nature of MSU. But characterization of the transaction forced upon AP&L as "cost reallocation" is contrary to Ordering Paragraphs (C) and (E) of the Commission's Order implementing Opinion No. 234, which affirmatively compel AP&L to become a "Purchaser," as the term is used in the UPSA, of a 36% "Entitlement Percentage." Appendix C, 216a. Even if properly characterized as a "reallocation," FERC's orders achieve the reallocation by compelling AP&L to become a purchaser of 36% of the power from Grand Gulf for the foreseeable future, thus transgressing the jurisdictional prohibition in § 201(b) of the FPA (16 U.S.C. § 824(b) (1983)) against FERC regulation of generating facilities.

The Court of Appeals acknowledged that the *Connecticut* decision established a legal limit on Commission authority over local distribution facilities, but refused to give the same effect to the parallel language limiting the Commission's authority over generating facilities. The Court of Appeals (Appendix A, 42a-43a and 43a n.73), as had the Commission (Appendix B, 108a), refers to footnote 6 of the opinion in *Connecticut*, 324 U.S. at 528-29, as justification for its decision. The footnote simply describes the decision in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 962 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), in which the Second Circuit construed the "but shall not" clause in § 201(b) to mean "shall have jurisdiction." The Court of Appeals' reliance upon the Court's dicta is improper because the holding in *Connecticut* was directly contrary to the interpretation given § 201(b) in *Hartford*.

The Court of Appeals also sought to justify its decision by relying on this Court's decision in *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952), as establishing FERC's authority to compel utilities to continue a past "practice." The general grant of authority in § 206 of the FPA to regulate practices is not, however, the specific grant of authority needed to regulate generating facilities consistent with § 201(b)(1) of the FPA. There is no specific grant of authority

in § 206(a) to force the transfer of generating capability. Second, the Court in *Penn Water* found, preexisting the agency's order, a "long-existing operational 'practice' of integrating [the utilities'] power output." The *Penn Water* Court upheld an order that such "practice" be continued. 343 U.S. at 422. Here, the agency directed initiation of an entirely new purchase by expressly directing a reformation of the UPSA to compel AP&L to become a purchaser. No such contract reformation was directed in *Penn Water*. *Penn Water* dealt with routine power sales and purchases among voluntary purchasers from existing facilities, not with determinations of (i) the very basic threshold issue of the identity of the purchasers; and (ii) to what extent the costs of an entirely new, costly generating facility and consequent rights to output (the "Entitlement Percentage") should be borne by those purchasers. Thus, the forced purchase of generating facilities resulting from FERC's orders here cannot be justified by *Penn Water*.

2. The Case Presents Questions Of Substantial Importance To Consumers In The States Served By MSU Operating Companies And In States Served By Other Holding Company Systems.

The operating company subsidiaries of MSU provide electric service to a total estimated population of more than five million. AP&L furnishes electric service in 65 (of 75) counties in Arkansas and 12 (of 114) counties in Missouri; MP&L furnishes electric service in the western half of Mississippi; LP&L provides electric service in major portions of northern, eastern and southeastern Louisiana and NOPSI furnishes electric service in the City of New Orleans. By forcing AP&L to become a purchaser of 36% of the Grand Gulf power, the FERC has transferred responsibility for hundreds of millions of dollars a year in Grand Gulf costs from Louisiana to consumers in Arkansas and Missouri (and, to a lesser extent, to Mississippi). The magnitude of the populations affected and of the costs of the facility are such that virtually no element of society in these areas is unaffected by the decision below. AP&L and its customers have been significantly harmed.

Beyond the areas served by the operating companies of MSU, the decision below will have direct effects on the three other holding company power pools operating today. These systems, which serve some nineteen million consumers in thirteen states, have substantial integration in planning and operation. In premising the forced purchase of generating capacity on the fact of integration in planning and operation, the decision below has direct implications on the ways these other three systems serve millions of additional consumers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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